SUPREME COURT, U. S.

No. 71-1161

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

[illegible] Hershkopf, and H. [illegible] Edwards, individually, and as President of The North American Hunter Conservation Society, a citizens conservation organization, and in behalf of all others similarly situated, *Petitioners*,

v.

Clifford M. Hardin, Secretary of Agriculture of the United States, a Maryland resident; American Spelling & Refining Company, a Delaware corporation, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

Daniel M. Gribbon
Richard B. Herzog
888 Sixteenth Street, N. W.
Washington, D. C. 20006
(202) [illegible]

Attorneys for Respondent American Spelling & Refining Company

Of Counsel:

Covington & Burling
888 Sixteenth Street, N. W.
Washington, D. C. [illegible]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1103

G. PETER HONCHOK and R. DOYLE GRABARCK, individually, and as President of THE NORTH AMERICAN HABITAT PRESERVATION SOCIETY, a citizens conservation organization, and in behalf of all others similarly situated, *Petitioners,*

v.

CLIFFORD M. HARDIN, Secretary of Agriculture of the United States, a Maryland resident; AMERICAN SMELTING & REFINING COMPANY, a Delaware corporation, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

In this respondent's view, the question presented is whether the General Mining Law of 1872, admittedly valid when enacted, has by reason of changed circumstances become unconstitutional on its face because it authorizes the development of minerals on public lands.

STATEMENT

Petitioners, citizens of West Virginia and Maryland respectively, brought this action in the District Court for the District of Maryland as individuals and as representatives of a Pennsylvania conservation organization. The complaint challenges the constitutionality of the General Mining Law of 1872, 30 U.S.C. § 21 et seq. (1970) (hereafter, the "1872 Act"), and seeks to enjoin the Secretary of Agriculture from permitting, and American Smelting & Refining Company (hereafter "ASARCO") from taking, actions with respect to a molybdenum deposit located in the Challis National Forest in Idaho that are authorized by the 1872 Act and the statutory provisions governing national forests.[1] The complaint does not charge any violation of that Act or the national forest statutes, the regulations thereunder, or any other act of Congress.[2]

The complaint prays for the convening of a three-judge court pursuant to 28 U.S.C. § 2284 (1970). Upon motions by the respondents, a single District Judge dismissed the complaint as to the Secretary of Agriculture because of improper venue and as to ASARCO "because the constitutional claim is insubstantial" (Pet. App. 5A). Petitioners appealed only the latter action and the Court of Appeals for the Fourth Circuit, upon consideration of the parties' briefs and without oral argument, affirmed the decision of the District Court per curiam (Pet. App. 13A).

The 1872 Act was enacted by Congress to encourage and govern the development of certain of the mineral resources located on public lands of the United States,

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[1] See 16 U.S.C. §§ 475, 478, 482, 528, 531(a).

[2] Issue No. 9 in the petition (Pet. 2b), if it purports to raise a statutory issue, is without basis in the record.

including national forests. It appears to be petitioners' contention that, though valid at the time of its enactment and for some indeterminate period thereafter, the 1872 Act should now be stricken as an exercise of congressional power that exceeds the authority to dispose of public lands provided for in Article IV, Section 3 of the Constitution.[3] In addition, the 1872 Act is claimed to be a deprivation of life, liberty and property in violation of the Fifth Amendment to the Constitution[4] as well as an exercise of a right retained by the people in derogation of the Ninth Amendment of the Constitution.[5] These constitutional infirmities are alleged to follow from certain generally described "modern fact circumstances." (Pet. 21).

REASONS FOR DENYING THE WRIT

1. The Decision Below Rests Upon Well Established Principles and Is Not in Conflict With Any Decision of This or Any Other Court

As petitioners acknowledge, the "fundamental question of this appeal" (Pet. 11) goes to the nature and scope of the power of Congress with respect to public lands under Article IV, Section 3, of the Constitution. While they contend that this power "is a mere conveyancing device" that carries no authority to choose among possible land uses, they themselves recognize that "the Courts have invariably held it was far more" than the narrow ministerial power for which they con-

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[3] "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ."

[4] "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

[5] "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

tend. (Pet. 3.) This concession by petitioners is demanded by the authorities which have repeatedly confirmed the principle that Congress has broad power with respect to the substantive policy choices involved in determining the manner in which public lands are to be utilized. See *United States* v. *City and County of San Francisco*, 310 U.S. 16, 29-30 (1940); *Alabama* v. *Texas*, 347 U.S. 272 (1954) (*per curiam*); *Light* v. *United States*, 220 U.S. 523, 537 (1911); *United States* v. *Gratiot*, 39 U.S. (14 Pet.) 526, 529, 537-8 (1840).

Petitioners' contention that to "meet Due Process requirements, the Secretary of Agriculture . . . must set some standards . . . or must make some requirements . . . or conduct some hearings on public benefit . . . ." (Pet. 18.) ignores the longstanding recognition by this Court that the 1872 Act itself contains standards of public benefit and "exacts a faithful compliance with the conditions required." *United States* v. *Iron Silver Mining Co.*, 128 U.S. 673, 676 (1888). Standards for the determination of what constitutes a "valuable" mineral deposit (see Pet. 18-19) in particular have been elaborated by this Court. See *Cameron* v. *United States*, 252 U.S. 450, 459 (1920); *United States* v. *Coleman*, 390 U.S. 599, 602 (1968), *reh. denied*, 391 U.S. 961 (1968).

Thus, petitioners' Due Process contention is in effect a disagreement with the judgments as to public benefit which are contained in the provisions of the Act. The decision below that to "reevaluate" those judgments "is for Congress and not the courts" (Pet. App. 12A) is clearly in accordance with well established principle under the Due Process Clause that the courts do not pass upon "the wisdom" of legislative determinations. See *Sunshine Coal* v. *Adkins*, 310 U.S. 381, 394 (1940); *Ferguson* v. *Skrupa*, 372 U.S. 726, 729-31 (1963).

In invoking the Ninth Amendment, petitioners make no claim that the decision below departs from established principles or is in conflict with any decision of any court (Pet. 20). The extreme diffidence with which the contention is tendered is most revealing: "Some of the foregoing is surely a Ninth Amendment argument" (Pet. 20).

2. There Are No Considerations That Warrant Reexamination of the Well Established Principles Relied Upon Below

This Court has recently noted that the 1872 Act is the "cornerstone of federal legislation dealing with mineral lands." *United States* v. *Coleman*, 390 U.S. 599, 600, n. 1 (1968), *reh. denied*, 391 U.S. 961 (1968). Petitioners have presented no considerations that warrant reexamination by this Court of the well established principles correctly applied below in affirming the constitutionality of this statute.

Petitioners' view of the power of Congress under Article IV, Section 3, is plainly erroneous and unworkable. They urge that Congress's trusteeship with respect to public lands "*excludes* consumption or expenditure of the trust property." (Pet. 11). Yet the essence of the section is the express grant to Congress of the power "to dispose" of property belonging to the United States. Nor is there merit to their contention that despite this express grant of power, the authority of Congress with respect to public lands is to be derived from the common law of private trusts. (Pet. 12-13.)[6] It is the provisions of the Constitution that govern the allocations of powers between Congress and the courts with respect to public lands. As petitioners recognize,

[6] In United States v. California, 332 U.S. 19 (1947), the Court said that public lands are not to be governed by rules designed "for private disputes." 332 U.S. at 40.

under their view of the Article IV powers, the role of Congress would be essentially ministerial. (Pet. 17.) The substantive public policy determinations would be made by federal courts under what petitioners see as an "inherent power" of courts "to see that the purposes of the trust are carried out." (Pet. 14.) In short, petitioners contemplate a legislating role for the federal courts in the administration of public lands and an executive role for Congress—contrary to the distribution of powers prescribed by the Constitution.

The petition attempts to support the necessity for a reexamination of constitutional principles by creating the impression (see Pet. 5-6, 15, 17, 21) that the 1872 Act has never been reexamined in light of changing conditions. That impression, wholly apart from its legal insufficiency to support the assumption of legislative functions by the Judicial Branch, is quite incorrect. The fact is that Congress has on many occasions significantly modified the impact of every basic element in the 1872 Act, either directly through amendment of that statute itself, or indirectly through changes in the complex structure of public land laws which surrounds the General Mining Law.[7] Moreover, in 1964, Congress

[7] Thus, Congress has removed certain lands from the coverage of the 1872 Act (see, *e.g.*, 16 U.S.C. §§ 21-2, 41, 43, and 91-2, 1132(a) and 1133(d)(3) (1970)), and has also removed certain minerals from the coverage of the 1872 Act. See, *e.g.*, 30 U.S.C. §§ 181, 193, 611 (1970). Congress also has recently taken steps to insure that where the 1872 Act still does operate, it is consistent with modern technologies (see 30 U.S.C. § 28-1 (1970)) and national interests in the development of other minerals which are not subject to the 1872 Act. See 30 U.S.C. § 526 (1970). In the 92d Congress there have been at least three bills introduced which would repeal the 1872 Act and substitute different standards and procedures for land utilization. See S. 921, S. 2542, H.R. 10640 in the 92d Cong., 1st Sess. (1971).

established by statute a Public Land Law Review Commission precisely in order "to have a comprehensive review" of all public land laws, including the 1872 Act, in light of "the current and future needs of the American people." 78 Stat. 982, 43 U.S.C. § 1392 (1970).[8] Review of the priorities between conflicting interests in the utilization of public lands is a matter of continuing national importance. But that review, under the Constitution, is for Congress and not the courts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

DANIEL M. GRIBBON
RICHARD B. HERZOG
888 Sixteenth Street, N. W.
Washington, D. C. 20006
293-3300
Attorneys for Respondent
American Smelting &
Refining Company

Of Counsel:

COVINGTON & BURLING
888 Sixteenth Street, N. W.
Washington, D. C. 20006

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[8] The report of the Commission to the President and to Congress is contained in "One Third of the Nation's Land, A Report to the President and to the Congress by the Public Land Law Review Commission" (June, 1970) (U.S. Govt. Printing Office: 1970 0-399-696).